LEVAL, *Circuit Judge*, concurring:

I concur fully in the opinion of the court. I add this separate concurrence to explain my understanding of an aspect of the *Morrison* opinion, in relation to our ruling. Our opinion concludes that "the relevant actions in this case are so predominantly German as to compel the conclusion that the complaints fail to invoke § 10(b) in a manner consistent with the presumption against extraterritoriality." Op. 44.

In reaching that conclusion, we do not identify, or rely on, any single factor or bright-line rule. Our opinion states that the conclusion is based on a number of facts. The claims focus on statements of a prominent German company, primarily made in Germany, concerning the stock of another prominent German company, which is traded on foreign exchanges, but not on any domestic exchange. The defendants were not parties to, nor did they participate in, the plaintiffs' swap agreements. These agreements referenced the German company's stock but did not give the plaintiffs any ownership interest in that stock. The alleged fraud has been investigated by German authorities and was the subject of adjudication in German courts. Consideration of all those facts leads us to observe, "Were this suit allowed to proceed as pleaded, it would

permit the plaintiffs, by virtue of an agreement independent from the reference securities, to hale the European participants in the market for German stocks into U.S. courts and subject them to U.S. securities laws. The potential for regulatory and legal overlap and conflict would have been obvious . . . ." Op. 44.

There is language in the Supreme Court's *Morrison* opinion which might be read as commanding that only bright-line, single-factor rules may be employed to determine when an invocation of § 10(b) would be impermissibly extraterritorial. Among *Morrison*'s criticisms of this circuit's longstanding test was that "the presence or absence of any single factor which was considered significant in other cases . . . [wa]s not necessarily dispositive in future cases." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 259 (2010). If *Morrison* intended to command that only bright-line, or single factor, tests be used, we would of course be required in this case to identify and follow a single-factor, or bright-line, test to govern our determination. As I understand *Morrison*, however, that was not its meaning. I believe it would be a mistake, and a harmful one, to so construe *Morrison*. Indeed, reading *Morrison* to permit only bright-line rules would likely undermine its principal holding that § 10(b) has no extraterritorial

application, while also providing unscrupulous domestic securities dealers with easy options to escape the coverage of the antifraud statute.

Morrison criticized the test the lower courts had been using on several different grounds. The principal criticism was that it "disregard[ed]" the presumption against extraterritoriality. *See id.* at 255. Instead of presuming that Congress does not legislate extraterritorially absent clear indication of contrary intent, under the conduct-and-effects test, courts "inquir[ed] whether it would be reasonable (and hence what Congress would have wanted) to apply [§ 10(b)] to a given situation." *Id.* at 257.

The second criticism was that, in this "disregard of the presumption," *id.* at 255, lower court rulings in cases such as *Schoenbaum v. Firstbrook*, 405 F.2d 200 (2d Cir. 1968), and *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), had applied § 10(b) inappropriately in circumstances that should have been governed by foreign law. *See Morrison*, 561 U.S. at 257 ("With *Schoenbaum* and *Leasco* on the books, the Second Circuit had excised the presumption against extraterritoriality from the jurisprudence of § 10(b) . . . .").

Thus, *Morrison*'s principal criticisms of the lower court jurisprudence, for their failure to guard against inappropriate extraterritorial extension of § 10(b),

had nothing to do with the courts' employment of a flexible test. What is more, the vice addressed by *Morrison*'s principal criticisms has been substantially cured by *Morrison*'s holding. *Morrison* commands that § 10(b) *not* be given extraterritorial application. Consequently, the main purpose for which courts now must find a useful test is to ensure, in transnational circumstances, that § 10(b) not be given extraterritorial application, while preserving the domestic coverage that Congress intended. Among the main reasons for which we conclude that *Morrison*'s domestic transaction test must be viewed as necessary, but not necessarily sufficient, to justify the invocation of § 10(b) is that otherwise application of the test would in some cases defeat the presumption against extraterritoriality. Given that § 10(b) suits may be brought not only against participants in a securities transaction but against any entity that perpetrated a deception in connection with the purchase or sale, applying § 10(b) whenever a suit arises out of a domestic transaction would require that the United States statute be applied inappropriately in many circumstances to foreign conduct far more suitably governed by foreign law.

There are substantial further reasons why I believe *Morrison* cannot be understood as intending to prohibit the use of flexible, multi-factor tests to guard

against extraterritorial application of § 10(b). Most important, the Supreme Court itself in *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. ----, 133 S. Ct. 1659 (2013), has construed *Morrison* and its presumption against extraterritoriality in a manner that calls for employment of a flexible, multi-factor analysis. The Court stated that claims under the Alien Tort Statute could be domestic under *Morrison,* even if based on foreign conduct, if they "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application." *Id.* at 1669. Whether foreign acts touch and concern the territory of the United States with sufficient force to displace the presumption is not a question susceptible to resolution by any bright-line, single-factor test.

Second, because multi-factor tests are so frequently employed in United States law for all sorts of purposes, we would expect that, if the Supreme Court intended to rule that only bright-line, single-factor tests can be recognized as valid law, it would state that message with unmistakable clarity. I see no such clear condemnation of multi-factor tests in the *Morrison* discussion.

The gist of *Morrison*'s criticism of the conduct-and-effects test as unpredictable—the criticism susceptible to misinterpretation—was that, as courts attributed an intent to Congress that coincided with whatever the particular

court thought to be good "policy" for the particular case, *Morrison*, 561 U.S. at 259, courts came to apply the test so inconsistently and unpredictably that it was not a test at all. *See id.* at 255-56 ("That has produced a collection of tests for divining what Congress would have wanted, complex in formulation and unpredictable in application."); *id.* at 259 n.4. ("Even if one thinks that the 'conduct' and 'effects' tests are numbered among Judge Friendly's many fine contributions to the law, his successors, though perhaps under the impression that they nurture the same mighty oak, are in reality tending each its own botanically distinct tree.").

In short, I do not read the Supreme Court's criticism as based on the failure of the lower courts to use a bright-line, or single-factor, test, but rather on the Supreme Court's perception that the lower courts had been disguising as a test an unprincipled approach to decision-making based on little more than the various courts' assessment of good policy for each particular case.

There are in my view still further important reasons to doubt that the Supreme Court intended by those unclear words to command that only bright-line tests could qualify as acceptable law. Use of a bright-line, or single-factor, test for that sort of question would be at odds with the tendency of modern

jurisprudence and would lead to seriously undesirable results, likely to be incompatible with the main objectives of the *Morrison* opinion.

The question whether application of § 10(b) to a particular set of transnational facts would be impermissibly extraterritorial has much in common with the choice-of-law question that arises when a court must determine which state or nation's law most appropriately governs a case involving interstate or transnational facts. Over the last half-century, at least in the absence of a binding contractual selection by the parties, courts have overwhelmingly abandoned bright-line tests in favor of more subtle and flexible inquiries for such questions because their complexity does not lend itself to reliable analysis by a bright-line test. *See*, *e.g.*, *Eli Lilly Do Brasil, Ltda. v. Federal Express Corp.*, 502 F.3d 78 (2d Cir. 2007) (conducting a multi-factor analysis under the Restatement (Second) of Conflict of Laws); *Hataway v. McKinley*, 830 S.W.2d 53, 56-59 (Tenn. 1992) (describing states' rejection of the bright-line rule of *lex loci delicti* in favor of more "flexible" approaches in tort cases); *see also* Restatement (Second) of Conflict of Laws §§ 145, 148, 188 (1971); Symeon C. Symeonides, *Choice of Law in the American Courts in 2010: Twenty-Fourth Annual Survey*, 59 Am. J. Comp. L. 303, 331 (2011) (categorizing states' choice-of-law methodologies); Symeon C.

Symeonides, *Choice of Law in the American Courts in 1993 (and in the Six Previous Years)*, 42 Am. J. Comp. L. 599, 600-612 (1994) (collecting cases). The Supreme Court's reasoning in *Kiobel*, which, as noted above, called for a flexible inquiry upon applying *Morrison* to the Alien Tort Statute, is consistent with the modern approach to such questions.

Furthermore, any bright-line, or single-factor, test for determining whether an application of § 10(b) is appropriately domestic would likely suffer from serious defects. A test so insensitive to changes of context would almost certainly be either under-inclusive, failing to protect the domestic securities markets and thus failing to carry out Congress's purpose, or (as with *Morrison*'s domestic transaction requirement if construed as not only necessary but also sufficient to make § 10(b) applicable) over-inclusive, compelling applications of § 10(b) to foreign conduct far more appropriately covered by foreign law, and thus contradicting the main thrust of *Morrison*.[1]

[1] Because § 10(b) applies not only to frauds by a party to a securities transaction against the counterparty, but also to any frauds that are "in connection with" a securities transaction, the mere fact that the securities transaction was domestic does not prevent application of the statute to frauds that are in all other respects foreign. Applying § 10(b) in such cases of overwhelmingly foreign facts could not be reconciled with *Morrison*'s admonition that the presumption against extraterritoriality is not a "timid sentinel" that "retreat[s] . . . whenever *some* domestic activity is involved in the case." *Morrison*, 561 U.S. at 266. Notably,

Additionally, a bright-line rule would perversely offer safe harbors for fraud. Bright-line rules can be highly beneficial in many circumstances, especially those involving good-faith dealings, because they support predictability and permit good-faith enterprises to plan for allocation of risk. But this same quality makes bright-line rules problematic when employed to govern those who operate in bad faith. Bright-line rules (unless seriously over-inclusive) would permit unscrupulous securities dealers to design their transactions with their victims so as to stay on the side of the line that is outside the reach of the statute. Defrauded victim investors would have no recourse to the law Congress passed to secure the integrity of U.S. securities markets. This would defeat the longstanding principle enunciated by the Supreme Court that § 10(b) "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes," *SEC v. Zandford*, 535 U.S. 813, 819 (2002) (internal quotation marks

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Morrison did not confront this kind of scenario, in which all the other facts point in the opposite direction from the solitary fact that triggers the bright-line rule. In *Morrison*, the most significant facts uniformly corroborated the impermissible extraterritoriality of this invocation of the statute. Not only were the securities transactions conducted in Australia among Australians, but the case involved "*foreign* plaintiffs suing [primarily] *foreign* [as well as some] American defendants for [foreign] misconduct in connection with securities traded on *foreign* exchanges." *Id.* at 250-51 (emphasis added).

omitted), and to protect against fraudulent practices, which "constantly vary," *Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12 (1971).

For all these reasons, most particularly the Supreme Court's own words and reasoning in *Morrison*, and in *Kiobel* when it undertook to apply the rule of *Morrison*, I do not read *Morrison* as prohibiting the use of a flexible, multi-factor test to ensure that § 10(b) not be applied extraterritorially.